

# Chameleon Radio Corporation

**Radio Station KFCC AM 1270**

10865 Rockley Road Houston, Texas 77099  
(281) 575-1270 fax (281) 879-1104

DOCKET FILE COPY ORIGINAL

May 1, 1997

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FCC MAIL ROOM

Mr. William F. Caton, Acting Secretary  
Office of the Secretary  
Federal Communications Commission  
Second Floor  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: Proposed Findings of Fact and Conclusions of Law in MM Docket 96-173

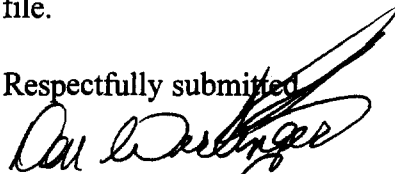
Dear Mr. Caton:

Transmitted herewith or an original and five (5) copies of the Proposed Findings of Fact and Conclusions of Law of Chameleon Radio Corporation in the above cited case.

Please be made aware of the fact that under separate cover, copies of this document are this day being sent via Federal Express overnight courier to the offices of the Honorable Joseph Chachkin, Administrative Law Judge in this case, as well as the offices of Mr. Alan E. Aronowitz, esq., the counsel the Bureau in this case.

A copy of this document is also being made a part of the KFCC public inspection file.

Respectfully submitted

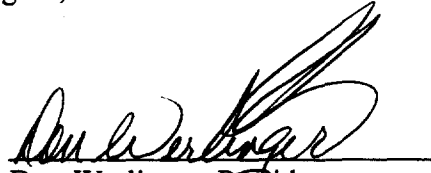


Don Werlinger, President  
Chameleon Radio Corporation

No. of Copies rec'd. 025  
List #

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW OF CHAMELEON RADIO CORPORATION has on this 1st day of May, 1997, has been delivered via Federal Express courier to the offices of Alan E. Aronowitz, Esq., Suite 8210, 2025 M Street, N.W., Washington D.C. 20554 and the Honorable Joseph Chachkin, Administrative Law Judge, Suite 226, 2000 L Street, N.W., Washington D.C. 20554. Another six (6) copies of the above have been sent via Federal Express courier to the offices of the Secretary, Federal Communications Commission, Second Floor, 1919 M Street, N.W., Washington, D.C. 20554.

  
Don Werlinger, President  
Chameleon Radio Corporation

DOCKET FILE COPY ORIGINAL

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

RECEIVED  
MAY 2 1997  
FCC MAIL ROOM

In Re

CHAMELEON RADIO CORPORATION )

Order to Show Cause Why the License of )  
Station KFCC (AM), Bay City, Texas )  
Should Not Be Revoked )

MM Docket No. 96-173

Request of Extension of Special )  
Temporary Authority )

To: The Honorable Joseph Chachkin  
Administrative Law Judge

PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW OF  
CHAMELEON RADIO CORPORATION

Don Werlinger, President  
Chameleon Radio Corporation, pro se  
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May 1, 1997

BEFORE THE  
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WASHINGTON, D.C. 20554

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In re )  
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Should Not Be Revoked )  
)  
Request for Extension of Special )  
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Before the Honorable Joseph Chachkin  
Administrative Law Judge

PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW OF  
CHAMELEON RADIO CORPORATION

1. These proposed Findings of Fact and Conclusions of Law relate to the Commission's "Order to Show Cause, hearing Designation Order, and Notice of Apparent Liability," released August 26, 1996 ("the FCC Order") in re Chameleon Radio Corporation ("Chameleon") and the subsequent hearing held before the Honorable Joseph Chachkin, Administrative Law Judge, in Washington, D.C. on February 24, 1997.

Summary

2. Set forth below are the Proposed Findings of Fact (Paragraphs 3 - 39) and Conclusions (Paragraphs 40 - 56) in the above cited case which taken together, lead to the conclusion that there is no basis for imposing any penalty on Chameleon and support the conclusion that Chameleon's application (BP-950804AC) should be granted.

### Proposed Findings of Fact

3. On April 20,1995, Chameleon Radio Corporation ("Chameleon") became the licensee of KFCC (AM) (formerly KIOX), Bay City, Texas. On the same date, Chameleon ceased operation of KFCC from its previously licensed site at Bay City (Tr. 99). On April 21,1995, Chameleon requested STA to operate from an alternate site in Harris County, Texas. (Chameleon Exhibit I, Appendix 3). Chameleon amended the STA request on May 2,1995. (Chameleon Exhibit I, Appendix 4).

4. By letter on May 5,1995, Commission staff granted the requested STA and by letter dated May 12,1995, amended the STA. (Chameleon Exhibit I, Appendix 6). The station operated from May 9,1995 under authority granted on May 5,1995, and from May 12,1995 until September 5,1996 under authority granted on May 12,1995 and subsequent authorizations.

5. On May 18,1995, the Commission rescinded the STA for failure to cover Bay City with a city-grade signal, over the signature of AM Branch staff engineer John Vu (Chameleon Exhibit I, Appendix 6).

6. On May 22,1995, Mr. Werlinger traveled to Washington and held meetings with AM Branch engineer John Vu, AM Branch Chief James Burtle and Larry D. Eads, then Chief of the Audio Services Division. At a meeting with Mr. Eads on May 25,1995, Mr. Werlinger explained both the terms of the purchase contract and subsequent sublease back to the seller as well as the construction of the tower at the STA site (Tr. 208). At the end of the ninety minute meeting, Mr. Eads stayed the effectiveness of the rescission order on May 25,1995 (Chameleon Exhibit I, Appendix 7).

7. When questioned on July 25,1995 in a Letter of Inquiry ("Inquiry Letter") (Appendix 8), Mr. Werlinger responded with a 19 page, type written letter as well as copies of all closing documents relating to the acquiring of KFCC (Chameleon Exhibit I, Appendix 11).

8. On August 4,1995, a form 301 application (BP-950804AC) (Chameleon Exhibit I, Appendix 10) seeking to make the Harris County site the permanently licensed site was filed with the Commission. That application was subsequently listed for cut-off on October 6,1995 and remains pending at this writing. The application was unopposed prior to the October 6,1995 cutoff. However, after the cut-off date opposition to the application was received by the licensee of station KWHI (AM), Brenham, Texas.

9. On November 2,1995, a Petition for Review addressed to the full Commission was filed by Chameleon.

10. On August 26,1996, the FCC Order initiating this proceeding was issued.

#### The Record

11. The record demonstrates that Mr. Werlinger showed no lack of candor in dealing with the Commission's staff during the more than 15 months between April, 1995 and August 1996. To the contrary, the record is a portrait of an individual exhausting every effort he could imagine to tell the story of his situation and seeking help to overcome extremely difficult circumstances.

12. Following the filing of the STA request on April 21,1995, Mr. Werlinger spoke by telephone with Mr. Vu daily prior to the granting of the STA. Immediately following the rescission of the STA, and on five additional occasions during the next six

months, Mr. Werlinger personally appeared before Commission staff (including the staffs of all the commissioners), explaining his case and giving straightforward answers to all questions asked. Mr. Werlinger engaged in extensive correspondence and met personally with AM Branch Chief James Burtle, then Chief of the Audio Services Division, Larry D. Eads, and Mass Media Bureau Chief Roy Stewart. At every opportunity, Mr. Werlinger attempted to clearly set forth his intentions and the motivations for all his actions in this case.

13. For its part, the Commission's staff has continually attempted to find lack of candor where none existed. It started with the first paragraph of the narrative in the STA request which describes the KFCC licensed site as "near Bay City" and in the next paragraph, the proposed STA site was described as "0.28 km (0.175 miles) east, southeast of the intersection of Riceville Road and Cravens Road in southwest Harris County," obviously two distinct and different sites. (Chameleon Exhibit I, Appendix 3 at page 3). A quick glance at any map of Texas shows Bay City is not in Harris County, but in Matagorda County, a number of miles from Harris County. Incorporated into paragraph one of the narrative of the original STA request was a typographical error as to the geographic coordinates of the licensed site for KFCC. Intending to refer to the geographic coordinates of the station's licensed site at Bay City, Texas, Mr. Werlinger erroneously typed into the narrative the geographic coordinates of the proposed STA site in Harris County (Chameleon Exhibit I, Appendix 3 at Page: 3). Mr. Werlinger neither attempted to deceive or confuse anyone, he simply made a mistake in typing. The station's licensed site coordinates have been a matter of record in the Commission's

database since 1947. Nevertheless, although both the licensed site and the proposed STA site were clearly marked in accompanying exhibits, this typographical error apparently led to some confusion among the Commission's staff, (Tr. 86-88).

14. A common sense approach to testing Mr. Werlinger's explanation for the typographical error would be to ask the question; 'if Chameleon is stating it has lost its licensed site and wishes to move to an alternate site what are the requested coordinates versus the licensed coordinates?' When it discovered that the coordinates used in the narrative and those of the requested STA site are one in the same, would not a reasonable person ask themselves why Chameleon was proposing to establish an STA in the exact same spot it was in the same sentence stating it had "lost?" And, if that reasonable person were a member of the FCC's AM staff, would that person not then check his or her own database to verify the licensed coordinate of the station's transmitter site? The test is so simple that only a fool would attempt to confuse the Commission's staff in such a way. Clearly, obviously, the error was typographical and unintended.

15. Additionally, it is noted that there was some confusion during the course of the hearing in February regarding Chameleon's reference to the Station's (KFCC's) "licensed site" in its April 21, 1995 narrative seeking STA, (Transcript at Pages: 83-84). Chameleon was correct when its said, "due to the loss of its currently licensed site." Although on April 21, 1995, Chameleon had not made use of the site and considered that as a result of its contract with seller Landrum Enterprises, Inc. ("Landrum"), it had no right to use the site. Nevertheless, the site itself remained the radio station's licensed location and Chameleon's reference to the site was strictly in that context. Chameleon



did not infer, nor did it intend to infer that it had ever made use of the site as a licensee. It was only stating that the site was the "licensed" location of KFCC's antenna as indeed it was.

16. Although the included exhibits in Chameleon's STA request indicated Bay City would be served with less than a city grade contour from the proposed STA, at no point in Mr. Werlinger's discussions with Mr. Vu was KFCC's coverage of Bay city an issue. In fact, prior to the May 5, 1995 grant of the STA, discussions with Vu centered on whether or not Chameleon should be allowed to construct a new tower for the purpose of establishing the STA. Mr. Vu's position was that Commission policy did not currently allow and had never allowed for new tower construction in STA situations. Mr. Vu stated that no changes had been recently made in the policy. This was in obvious conflict with at least three other STA's with which Mr. Werlinger was directly associated, all of which were handled by Mr. Vu's predecessor May Bradfield who apparently had no such understanding, as well as with several other STA's with which he was familiar. Subsequent Commission admissions show that at the time there were no written policies specifically relating to antenna construction for STA's.

17. However, the Commission's staff revealed the apparent basis for Mr. Vu's position on antenna construction in its July 25, 1995 Letter of Inquiry ("the Letter"). (Chameleon Exhibit: I, Page 4, at 2). In referencing its "policy" on antenna construction in the Letter, staff does not point to a prohibition against antenna construction in STA's, rather stating in part, "we are *disinclined* (emphasis added) to grant authority in cases where the applicant intends a construction of permanent facilities." Staff makes the above

statement citing the case Patton Communications Corp., 48 RR 2d 349 (1980). The letter did not state that antenna construction in STA's is "prohibited," only that the Commission staff might take a dim view of such requests. In fact, the use of the word "disinclined" as opposed to the word "prohibited" was the result of the Commission's staff leaving itself the option to grant construction in other, unspecified circumstances. When staff decides it will allow antenna construction, it gives itself authority to do so. When it prefers not to allow construction or simply wishes to be punitive, it cites a rule or case law to justify the decision and disallows the requested construction. This is the essence of the word arbitrary. Using this policy, Commission staff can make any decision it pleases and then use the "policy" to exonerate that decision. Clearly, a reading of the Patton Communications case indicates that not only was the construction of the tower in the instant case permitted, the actual circumstances of the tower's construction did not violate Commission policies or rules.

18. In citing Patton, the Commission's letter references WSAV, Inc., 10RR 402 (1955), which stated in part:

"the Congressional intent and objective underlying [Section 319(a)] was to discourage applicants from making large investments and using such investments as 'improper pressure' on the licensing authority."

WSAV, Inc. also states:

"Congressional expression is devoid of specific reference to the type of preliminary steps which an applicant might take in connection with construction of 'special buildings' or 'land installations.'"

19. The Patton case goes on to state that the Commission has "continued to permit *acquisition of equipment and construction of facilities which, in and of themselves,*

*have no intrinsic function related to the proposed new facility (emphasis added),”* but adds that it has found violation of Section 319(a) of the Communications Act under certain circumstances in which applicants constructed towers and then prematurely attached such things as “antennas and wave guides....microwave equipment (wave guides, antennas, or passive reflectors).” All the equipment mentioned above relate directly to broadcast use. Clearly, construction of a tower onto which no broadcast equipment, either above ground or below, does not constitute premature construction in violation of Section 319(a) of the Communications Act.

20. In April, 1995, Mr. Vu’s stated position on Commission policy certainly did not follow that of the Patton case as stated in the Letter. His position was that there was an absolute prohibition against antenna construction in STA cases and he refused any suggestions by Mr. Werlinger that there either was now or ever had been any flexibility in the policy.

21. After arguing his case with Mr. Vu for a week, Mr. Werlinger decided to abide by what he believed to be Mr. Vu’s misinterpretation of policy and arranged to have a non-broadcast tower erected at another location on the same property, approximately 250 feet from the originally proposed STA antenna location. The tower, which had neither a ground system nor the proposed folded unipole antenna attached to it, was constructed on May 1, 1995. The tower was a simple 180 foot tall structure with no particular use of any kind. It was not a part of a multi tower array and was situated in the middle of an open field. Its construction had been approved by the FAA and as constructed, having no broadcast related equipment attached to it, required no FCC

approval (Tr. 173). Under either the Patton test or that of WSAV, Inc., Mr. Werlinger was within his right to construct the bare tower on May 1, 1995 and then later report the structure as existing while at the same time violating no prohibitions against premature construction.

22. On May 2, 1995, Mr. Werlinger sent Mr. Vu an amendment to the STA request (Chameleon Exhibit I, Appendix 4), citing the now existing non-broadcast tower as the proposed STA tower. Subsequently, on May 5, 1995, the Commission granted the STA under Mr. Vu's signature (Chameleon Exhibit I, Appendix 5).

23. In constructing the tower, Mr. Werlinger exercised his right as a citizen to construct the tower. In its originally constructed configuration, the tower had no broadcast use. It was constructed with FAA approval and had the STA not been granted, it would have been made available for rental use by two-way communications, and cellular telephone companies. Whether the tower existed one day or ten years, it was in fact, an existing tower when the amendment was sent to Mr. Vu on May 2, 1995. All the permits, state, local, and federal necessary to construct a non-broadcast tower had been previously obtained. No zoning laws were violated; no law of any kind was broken as a result of its construction. Not until after the STA was granted under Mr. Vu's signature on May 5, 1995 was the tower retrofitted with the necessary broadcast equipment (folded unipole antenna, various insulators and ground system) and made ready for use as an AM broadcast antenna. Thus, no premature construction occurred and Mr. Vu's misguided and obviously erroneous understanding of the rules and policy was not violated.

24. With respect to Chameleon's loss of its Bay City site, Chameleon was abundantly clear in its position regarding its contractual obligations to leave the licensed transmitter site in Bay City. The loss of the transmitter site was due to a sublease to the station's seller Landrum, and while Chameleon was not forcibly removed from the site, it had negotiated the sublease as part of the original purchase negotiations and was bound by the terms of the sublease to leave the premises once the sale was consummated. When asked by Commission staff regarding the matter, Chameleon was completely forthcoming in its response, both in personal meetings between Mr. Werlinger and staff, and in its written responses.

#### Chameleon's Request To Change City of License

25. The public interest considerations which motivated Chameleon to seek and pursue the change of KFCC's city of license clearly meet the public interest tests of both the Communications Act and the Commission's rules.

26. KFCC is one of four radio stations in the Bay City, Texas market. It is a low power, 1 kw operation and the only AM in the market along with three high power (Class C) FM facilities. Bay City is a stagnant farming/ranching community with a 1995 census of 18,498, virtually unchanged from its 1980 census of 17,837 and 1990 census of 18,370 (Source: Texas Department of Commerce, statistics division). Prior to its purchase by Chameleon, the station did not provide its own programming, rather it rebroadcast the audio portion of CNN Headline News on a 24-hour a day basis (Chameleon Exhibit I, Pages: 19-20, Paragraphs 47-48).

27. By changing its city of license to Missouri City, Texas, an AM station which was faced with extinction as a stand alone facility in Bay City will be relicensed to the largest incorporated city in Fort Bend County, Texas, the population of which county is one of the ten fastest growing in the United States. With a 1996 population of 42,498 (U.S. Census population block information), Missouri City is currently without a locally licensed broadcast service.

28. The reallocation of 1270 kHz to Missouri City as KFCC's city of license is preferable to Bay City using any of the Commission's criteria. Missouri City's population is not only more than double that of Bay City, it is more than 5,500 persons greater than all of Matagorda County (36,928 - 1990 U.S. Census Bureau) of which Bay City is the largest city and the county seat.

29. Fort Bend County, Texas (Population 290,841 persons, Source - U.S. Census Bureau) is currently served by only two broadcast outlets, KMPQ AM (980 kHz, 1 kw, ND-D) and KLTO FM (285A, 104.9 mHz, 2.55 kw, 107 HAAT), each licensed to the far west county cities of Richmond and Rosenberg. Eastern Fort Bend County, which is home to more than 65% of the county's residents, currently has no locally licensed broadcast outlet.

30. The reallocation of KFCC's facilities to Missouri City provides for more efficient use of the spectrum increasing KFCC's daytime power to 2.5 kw while dramatically reducing grandfathered overlap to first adjacent station KWHI (AM) at Brenham, Texas thus contributing to the Commission's often voiced goal of reducing previously licensed overlap on the AM band.

### Commission Actions and Policies Inconsistent

31. The Commission's actions show a pattern of inconsistent, confusing and contradictory application of rules and policies, some of which had not even been reduced to writing at the time Mr. Werlinger had to contend with them. This pattern of inconsistent behavior is brought crystal clear by contrasting the KFCC case with that of KVCJ in Mineola, Texas.

32. At the hearing in February (Tr. 132-154), Commission counsel attempted to show the case of KVCJ at Canton, Texas (Chameleon Exhibit I, Appendix 21) was an example of Mr. Werlinger's misunderstanding of the Commission's rules. (Commission's exhibit 22). Instead, an examination of the KVCJ case reinforces Chameleon's contentions regarding the similarities between the two cases and the inexplicably different ways they were handled by Commission staff.

33. KVCJ's original 1993 STA was granted and then renewed eight times until January 1996 when it was revoked and KVCJ ordered silent. In virtually all material respects, the KVCJ STA mirrors that of KFCC which would appear to be the reason for the rescission of KVCJ's authority in January, 1996. However, in March 1996, the STA was again granted and then renewed three more times until a construction permit was issued in January, 1997 to make the site permanently licensed. This occurred in spite of the fact that by March, 1996, the Commission's staff was well aware of the following facts: 1. it had granted to KVCJ an STA requiring new antenna construction (which occurred) and in which the applicant stated its intent to seek a construction permit for permanent licensing of the station at the STA site; 2. it had granted an STA which

resulted in the moving of the station to the distant community of Canton, Texas some 23 miles away from the station's community of license, Mineola, Texas; 3. that such a move was in effect, establishing new service in another community and; 4. abandoning service to Mineola, Texas. KVCJ's residual service contour to Mineola, Texas following start of broadcast from its STA site was far below the required 5.0 mV/m "city grade" contour. In fact, it was less than half that of KFCC's residual contour over Bay City, Texas from its STA site. This occurred without the licensee first being required to make an application for the change and going through the form 301 major change process.

34. The Commission's counsel stated at the February hearing that a mistake was made in granting the original KVCJ STA due to the information presented in the STA request prepared by Mr. Werlinger. However, this does not explain why, in light of the fact that the Commission's staff was at the time preparing to seek license revocation against Chameleon in a case with an incredible number of parallels to the KVCJ situation, and in light of all of the facts stated in paragraph 30 above, the Commission's staff reinstated the STA for KVCJ in March, 1996.

35. It seems incredible that at the very least KVCJ has apparently never been asked the questions which are central to the Bureau's case against Chameleon. For instance, why did the KVCJ licensee contractually "abandon" a then licensed and existing tower site in 1993 and seek construction of a new antenna 23 miles away? Did local zoning changes make the move necessary? Was there an argument with the seller of the AM who owned a co-located FM at the site, an argument which resulted in KVCJ being evicted? Or was it simply a matter of KVCJ, knowing it was going to relicense the



station to Canton, Texas, deciding not to make use of the licensed site and seeking authority (which was granted) to move to the new city via STA?

36. Also, apparently no demand was made seeking the answer to why KVCi should not seek another site which would provide Mineola with required city grade (5 mV/m contour) service after the station claimed the licensed site had been sold and the tower dismantled (Tr. 174). While these issues were not addressed in the original 1993 STA grant, nor apparently in subsequent renewals of the STA, why were they not addressed in February and March, 1996 when they clearly constituted questions exactly paralleling those in the KFCC case?

37. Why in January, 1997, was Chameleon preparing to defend itself in the current case while Commission staff was renewing the STA of a station with a parallel situation less than two hundred miles away? Indeed, instead of being in the same position as Chameleon, apparently all the licensee of KVCi had to do was claim it had been "mislead by its previous consultant...(into)....believing it was in compliance with the Commission's rules and policies," (Tr. 149), and all else was forgotten. KVCi was again issued an STA to remain at the same site and allowed to operate with the same power it had been authorized to use in the original STA request prepared by Mr. Werlinger in 1993. Apparently KVCi's licensee was correct in its original assumption that it was in compliance with Commission policy on the matter; otherwise, it would now be the subject of an inquiry as is Chameleon instead of operating from the same site it originally requested in 1993.

38. In fact, in spite of its protestations to the contrary, the Commission's handling of the KVCJ case, coupled with its admission that there were no written rules or policies regarding antenna construction and now the revelations of the Patton Case, demonstrate that Mr. Werlinger had every right to be both surprised and confused at the changes presented him by Mr. Vu when Werlinger first sought the KFCC STA. Clearly, the Commission had no set standard for handling STA requests leaving the licensee of any station requesting STA to navigate a mine field of ambiguities and deal with the "different bureaucrat, different rules" phenomena in order to receive an STA. This was the situation which faced Mr. Werlinger in April, 1995 when Mr. Vu presented him with a completely different set of standards regarding antenna construction than had been Mr. Werlinger's experience in the past, particularly in the KVCJ case where the station was moved well beyond its original city of license, allowed to discontinue providing city grade service to that city effectively establishing first service to another city (a situation which was allowed to exist, with only the interruption in February and early March, 1996, until January, 1997) prior to its filing of a form 301 request, and allowed to construct a new antenna in order to establish that goal.

#### Conclusions

39. The record in this case shows that through its president Don Werlinger, Chameleon negotiated the purchase of KFCC with the intent of seeking a change in the station's city of license, a common activity well within the Commission's policies and rules as well as the Communications Act. Mr. Werlinger negotiated a purchase obviously agreeable to both parties which would not only allow the station to make the anticipated

change, but obligated Chameleon to relocate its transmitter upon consummation of the purchase by Chameleon.

40. Though Mr. Landrum's (Landrum Enterprises, Inc.'s president) affidavit suggests he would have had no problem with KFCC's utilizing the Bay City transmitter site, Chameleon's opinion of the terms and conditions of the contract differ. Chameleon believes that in moving from the Bay City site, it acted forthrightly and in accordance with the terms of the sublease to Landrum and no court has ever issued a determination to the contrary in the matter. Furthermore, Landrum held a lien against the equipment sold to Chameleon in the transaction. If Landrum had not anticipated a move of the equipment by Chameleon, why did it make no objection to the move when it occurred? No objection occurred because in moving to the new site, Chameleon was only fulfilling its obligations under terms of its contract with Landrum.

41. Chameleon was completely forthcoming with information regarding its contract of sale and the land sublease to Landrum. Both documents were presented to the Commission as part of Chameleon's Form 314 filing seeking the assignment from Landrum to Chameleon. One can only assume that both were reviewed by Commission staff prior to its approval of the assignment application.

42. In seeking the STA at the Harris County site, Mr. Werlinger was again forthcoming. The terms and conditions of the contract of sale and the sublease to Landrum which led to the contractual obligation to leave the Bay City site were already a matter of record prior to the filing of the STA request. Their review had just been a part of the Commission's review of Chameleon's form 314 request to purchase the station.

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43. In filing the STA request and deciding what information to provide in that request, Mr. Werlinger relied on his years of experience in working with the Commission's staff relating to documentation and required information. He was well aware that some STA requests provided no technical showing at all, but were granted in response to a simple letter request. And he was of course, aware of how the Commission's staff had granted the initial STA request and numerous extensions for station KVCJ at Mineola, Texas. Therefore, he considered the information contained in his original request to be more than sufficient for the Commission's staff to make a determination on the request. His belief proved reasonable when, with the exception of the question relating to antenna construction, the STA was granted fifteen days after it was originally requested.

44. As to the question of antenna construction, the fact is, Mr. Vu had no understanding of whatever unwritten policy there was because no clear policy regarding antenna construction in STA's existed. That is brought into focus in a review of the Commission's July 25, 1995 Letter of Inquiry. (Chameleon Exhibit I, Page: 4, at 2). As justification for the supposed policy regarding STA antenna construction, the staff letter made a feeble reference to being "disinclined" to grant construction in such case. No prohibition was cited in the Letter because none exists as Mr. Werlinger repeatedly and ultimately failed in pointing out to Mr. Vu.

45. In citing the Patton case, the Commission directs us to its Achilles heal in this case, pointing precisely to the source of its ambiguous and contradictory authority to act. Dipping into Patton, the staff grants to itself the ability to have its cake and eat it too. Better than having an outright prohibition, the staff can make either decision it pleases and use this case as justification. By saying, “we are *disinclined* (emphasis added) to grant authority in cases where the applicant intends a construction of permanent facilities,” citing Patton Communications Corp., 48 RR2d 349 (1980). (Chameleon Exhibit I, Page: 4, at 2), the staff is actually saying, “we’ll do it any way we please. If we’re happy with you and you’ve not disturbed the status quo, we might well allow you to construct an antenna. But if you present us with a problem, we’ve got every right to hammer you.” This is the word “arbitrary” defined and the staff’s arbitrary and punitive use this “authority” in this case clearly demonstrates such. At best, its application here was tortured logic. At worst, it was an arbitrary and poorly considered misapplication of policy and in fact, an abuse the Commission’s regulatory process.

46. As to the direct question of whether or not Chameleon engaged in premature and unauthorized construction at the amended Harris County site, Patton Communications and WSAV, Inc. provide the test. Question: In constructing on May 1, 1995 a 180 foot tower on land it legally held and for which it FAA authorization and which met all local zoning and construction permit requirements, did Chameleon and Mr. Werlinger violate Commission policy and the law regarding premature construction? Answer: If no broadcast related equipment antennas, wave guides, passive reflectors, or as in this case, insulators, ground system, and folded unipole antenna, were attached to

the tower, then no premature construction had occurred; hence, no violation of the rules or law.

47. All the above withstanding, the tower at the amended Harris County site was erected with FAA approval. It was not in any way configured as a broadcast tower when it was constructed on May 1, 1995, thus it was not subject to Commission approval prior to its construction. Only after approval was received for the STA were the necessary ground system and folded unipole AM antenna added to the tower to convert it to use by KFCC.

48. A look at Mr. Werlinger's history before the Commission further burdens the Bureau in proving its case. Not only are the allegations against Mr. Werlinger in this case false, Mr. Werlinger's now nearly 27 year history in the broadcasting industry (Chameleon Exhibit 1, Par. E 35-36) demonstrates a career replete with examples of work resulting in more efficient utilization of both the AM and FM spectrums and more communities receiving better service on each band.

49. Since beginning work as a technical consultant in 1980, Mr. Werlinger has prepared engineering studies and reports which have resulted in more than 30 new AM and FM allocations and grants in seven states including Texas, Louisiana, Arkansas, Oklahoma, Nebraska, New Mexico, and California.

50. During the same time, Mr. Werlinger has held owner/operator, or management responsibilities for more than ten radio stations, those stations having been subjected to numerous field office inspections. In only one case did a field inspection result in a notice of violation being presented to an operation controlled by Mr. Werlinger

and that violation was not deemed by the field office to be of such a nature that a monetary forfeiture was ordered. Through his work before the Commission both as a consultant to other broadcasters and as a licensee representing his own interests, Mr. Werlinger has presented more than one hundred applications, rulemaking requests, and reports to the Commission, the vast majority of which resulted in grants of the authority requested. He has a much longer record before the Commission than most broadcasters and that record shows no evidence of previous serious rules violations or any disregard for the Commission's rules, regulations or processes.

51. So, why is this case before the Court in the first place? As stated by Mr. Werlinger in his testimony at the February hearing, the genesis of the instant proceeding is the attempt by AM Branch Chief James Burtle to punish Mr. Werlinger for Werlinger's aggressive defense of Chameleon's position in the STA question, first by taking the matter up with higher authorities inside the Commission and then by taking his battle into federal court. Burtle's actions were prompted by political pressure applied to him and other members of the staff by Salem Communications, a rival Houston area broadcaster which had just canceled Chameleon's LMA on KENR and which would potentially benefit from the cancellation of the newly granted STA because the business built by Chameleon on KENR was now being taken to KFCC and said cancellation would potentially result in the business reverting to KENR. The revocation sought in this matter is Burtle's attempt to punish Werlinger for deciding to challenge a staff level decision (specifically, Burtle's decision to cancel the STA) through an appeals process clearly within Mr. Werlinger's right (Tr. 212, 8-20).

52. If this were not the case, how can the Bureau defend its contradictory actions in the case of KVCJ? The Commission's staff first approved KVCJ's request for STA in 1993 and granted routine renewals until, in January 1996, following the KFCC controversy, it apparently decided to apply the same standards to KVCJ as it did to KFCC. However, once the licensee of KVCJ claimed it had been "mislead" by Mr. Werlinger regarding the Commission's STA policies, Commission staff again reversed itself, and; 1. granted for a second time an STA which allowed KVCJ to abandon its city of license without first going through the Form 301 process; 2. allowed KVCJ to "establish" through the STA process a "city of license presence" in Canton, Texas (with transmitter, antenna, studios, offices, telephones, etc. in Canton, not Mineola); and 3. renew another three times (until January 1997) that STA while subjecting Chameleon and Mr. Werlinger to this revocation proceeding. All this occurred in 1996 in full light of the KFCC controversy with Mr. Werlinger's name apparently being central to the negotiations for the continued STA at Canton, Texas. There simply must be two sets of rules and policies, one set for Don Werlinger and one for other licensees.

53. The following are facts:

A. KFCC was purchased by Chameleon from Landrum in early 1995 for the sole purpose of continuing the unique programming service it had established on KENR by relocating the station's city of license to a city nearer the Houston metropolitan area. Chameleon negotiated both a sales contract and a sublease of property back to Landrum for use by Landrum in his FM operation. Once the transaction was consummated on April 20, 1995, the terms of the contract *required* (emphasis added)



Chameleon to abandon the transmitter site in Bay City, period. Mr. Werlinger believed those terms in April of 1995. He believes them now.

B. Based upon his knowledge and previous experience in seeking and receiving grants for STA operations, especially that of KVCJ in Mineola, Texas which had been prepared by Werlinger and granted only 18 months previous, Don Werlinger had no reason whatever to suspect that his request for STA in the KFCC matter would not be routinely granted when he prepared to seek the STA in April, 1995. Therefore, he had absolutely no reason to withhold information from or to be less than completely candid in the information he presented to the Commission in his STA request.

C. Presented with new and heretofore unknown "policies" regarding antenna construction by a Commission staffer, "policies" which defied standard logic, reasoning and years of experience, Mr. Werlinger broke no Commission rule and violated no law or rule of any other governmental agency when he arranged to have a tower constructed on land legally held by his company. His amendment on May 2, 1995 stating that an existing tower was on the site and available for use in the STA was, purely and simply, the truth. The subject needed no amplification. With no guarantee whatever that an STA would be granted for the site, Mr. Werlinger made use of the only resources available to him in complying with a new and unexpected policies.

D. Once a controversy arose regarding the STA, Chameleon and Mr. Werlinger were quick respond to the situation. Mr. Werlinger originally went to Washington the week of May 22, 1995 seeking help from the Commission staff. In succession, he told the complete story to Mr. Vu, then to Mr. Burtle, and finally to Mr.